No. 86-1749

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BONNIE J. BENZIES,

Petitioner,

vs.

ILLINOIS DEPARTMENT OF MENTAL HEALTH & DEVELOPMENTAL DISABILITIES,

Respondent.

BRIEF OF THE CHICAGO LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, WOMEN EMPLOYED, AND THE WOMEN'S BAR ASSOCIATION OF ILLINOIS AS AMICI CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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CONSENT OF PARTIES

This brief is being filed on behalf of the Chicago Lawyers' Committee for Civil Rights Under Law, the Mexican American Legal Defense and Educational Fund, Women Employed and the Women's Bar Association of Illinois as amici curiae with the consent of all parties. Pursuant to Supreme Court Rule 36, petitioner's and respondent's letters of consent are being filed with this brief.

INTEREST OF AMICI CURIAE

The Chicago Lawyers' Committee for Civil Rights Under Law was organized in 1969 as one of many such committees throughout the country. Its purpose was and still is to involve private attorneys in an effort to ensure civil rights to all Americans. Over the past eighteen years, the Chicago Lawyers' Committee has enlisted the services of many hundreds of members of the private bar in providing legal representation to minorities, the poor, and the disadvantaged who are being deprived of their civil rights. The Chicago Lawyers' Committee has represented the interests of women, blacks and Hispanics in numerous class actions relating to employment discrimination, voting rights, equalization of municipal services and school desegregation.

The Mexican American Legal Defense and Educational Fund is a national civil rights organization founded in 1967. Its principal objective is to secure, through litigation and education, the civil rights of Hispanics living in the United States.

Women Employed is a national organization of working women. It assists working women facing sexual discrimination and monitors the enforcement activities and policies of the Equal Employment Opportunities Commission and the Office of Federal Contract Compliance with regard to a broad range of employment discrimination issues.

The Women's Bar Association of Illinois (WBAI), established in 1914, has over one thousand members throughout the State of Illinois. The WBAI is concerned with a wide variety of issues that confront women, including the issue of employment discrimination.

Amici have a direct interest in the law governing the construction and application of Title VII of the Civil Rights Act of 1964 (Title VII). Amici and those individuals who Amici represent litigate under Title VII regularly and thus have a strong incentive to prevent diminution of the statute's powers as a source of redress for civil rights violations.

ARGUMENT

THE SUPREME COURT SHOULD GRANT BENZIES' PETITION FOR A WRIT OF CERTIORARI BECAUSE THE COURT OF APPEALS' DECISION UNDERMINES THE EFFECTIVENESS OF TITLE VII

In *Benzies v. Illinois Department of Mental Health & Developmental Disabilities*, 810 F.2d 146 (7th Cir. 1987), the Court of Appeals for the Seventh Circuit greatly restricted the availability of Title VII of the Civil Rights Act of 1964 as a remedy for employment discrimination by misconstruing the case law of this Court. The proper application of Title VII is of the utmost concern to members of racial, religious, national origin and gender groups whose lives in the workplace are impermissibly disrupted by the prejudicial conduct of their employers. The right to be free from discrimination in the workplace is basic. In order to preserve the full protective force of Title VII as intended by Congress, this Court should grant Benzies' petition and reverse the decision of the Court of Appeals.

The Court of Appeals' decision contravenes both the clear intent of Congress in enacting Title VII and the consistent interpretation of that statute by this Court. As this Court stated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973):

> [t]he language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens.

Although Title VII was enacted to ensure the substantive right of all individuals to be free from discrimination in the workplace, the decision in *Benzies* dramatically reduces the likelihood of a plaintiff prevailing in a Title VII case.

Judge Easterbrook, writing for the court,* determined that:

> [a] demonstration that the employer has offered a spurious explanation is strong evidence of discriminatory intent, but it does not compel such an inference [of discrimination] as a matter of law. . . . The failure of an explanation to persuade the judge supports an inference that a bad reason accounts for the decision, but it is not invariably conclusive; the presence of sufficient explanation, however, is dispositive against the plaintiff. (A "sufficient" explanation is one that would produce the same decision whether or not the prohibited characteristic played some role.)

Benzies, 810 F.2d at 148. Thus, under *Benzies*, a plaintiff may no longer raise a legally compelling inference of discrimination by showing that the defendant's proffered explanation is unworthy of credence. Instead, a plaintiff who makes such a showing is also required to demonstrate directly that the defendant intentionally discriminated against him or her *and* that no other possible explanation could justify the employer's challenged action.

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* Judge Posner and Judge Parsons joined in the opinion with Judge Easterbrook.

Unless a plaintiff is fortunate enough to have overheard an unschooled employer brag of improper motivation, a plaintiff would be required to prove his or her case by an ultimately impossible process of elimination. A plaintiff must now anticipate and respond to every conceivable non-discriminatory explanation for the challenged action, even if unexpressed by the defendant and simply conceived by the court *sua sponte*. Judge Easterbrook thereby erects a difficult, if not insurmountable, hurdle for the Title VII plaintiff—a hurdle which conflicts with Congress' desire to ensure equality in the workplace.

The chilling effect of *Benzies* will severely deter potential plaintiffs from bringing Title VII lawsuits. In contemplating whether to file such a complaint, a plaintiff must evaluate not only the defendant's proffered explanation, but also any possible explanation that the trial court might conjure up for the defendant's conduct. A plaintiff stalwart and steadfast enough to undertake litigation is thereby faced with the unenviable prospect of preparing for a "*Benzies* trial," a trial requiring defense against the complete universe of potential non-discriminatory explanations for the employer's conduct.

Finally, the opinion in *Benzies* neglects the principle of *stare decisis*; it stands in stark contrast to this Court's clear holdings in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981) and *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983). In *Burdine*, this Court stated that a plaintiff could prevail in a Title VII case after successfully proving that the employer's explanation was pretextual:

> This burden [of proving pretext] now merges with the ultimate burden of persuading the court that [the plaintiff] has been the victim of intentional discrimination. [The plaintiff] may succeed in this either directly

> by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. *See McDonnell Douglas*, 411 U.S. at 804-805.

450 U.S. at 256. Predictably, a majority of circuits have faithfully applied the formula of the *McDonnell Douglas*, *Burdine* and *Aikens* rulings. *See, e.g., Schmitz v. St. Regis Paper Company*, 811 F.2d 131 (2d Cir. 1987); *Monroe v. Burlington Industries*, 784 F.2d 568 (4th Cir. 1986); *Sylvester v. Callon Energy Services, Inc.*, 781 F.2d 520 (5th Cir. 1986); *Tye v. Board of Education of Polaris Joint Vocational School District*, 811 F.2d 315 (6th Cir. 1987); *Kimborough v. Secretary of United States Air Force*, 764 F.2d 1279 (9th Cir. 1985); *EEOC v. Gaddis*, 733 F.2d 1373 (10th Cir. 1984).

In spite of the clarity of this Court's decisions, several circuits have misconstrued the *McDonnell Douglas* line of cases. Even in their misconstructions of Title VII, the circuits have been inconsistent. *See, e.g., White v. Vathally*, 732 F.2d 1037 (1st Cir. 1984) (A showing of pretext by the indirect method does not suffice to meet the burden of demonstrating discriminatory intent.); *Lewis v. University of Pittsburgh*, 725 F.2d 910 (3rd Cir. 1983), *cert. denied*, 469 U.S. 892 (1984) (A plaintiff must prove by the direct method that intentional discrimination was the "but for" cause of the challenged conduct.); *Conner v. Fort Gordon Bus Co.*, 761 F.2d 1495 (11th Cir. 1985). (Plaintiff must prove that the defendant's articulated reasons were not the sole cause of the discharge, but that discrimination made a difference in the decision.) Thus, Judge Easterbrook is not alone in his misconstruction of Title VII. Further, the confusion over the proper application of the *McDonnell Douglas* formula is most pronounced among those decisions that erroneously reject the concept

that a conclusive inference of discrimination can be established by the indirect method of proof.

The *Benzies* opinion is simply one in a series of significant steps in the erosion of the safeguards provided by Title VII. This continuing erosion is a compelling indication that this Court's decisions in *McDonnell Douglas*, *Burdine* and *Aikens* have provided insufficient guidance to the lower courts in interpreting Title VII. Although *Benzies* is a sex discrimination case, the decision affects all groups protected by Title VII. It is therefore critical to the ongoing vitality of Title VII that this Court reverse the opinion of the Court of Appeals in *Benzies* and reaffirm the viability of the indirect method of proving discrimination outlined in *McDonnell Douglas* and *Burdine*.

CONCLUSION

For these reasons, the Amici respectfully request that this Court grant Benzies her petition for a Writ of Certiorari.

Respectfully submitted,

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